Supreme Court, U.S.
FILED

94 597 AUG 26 1994

OFFICE OF THE CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MORRIS B. MYERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX

MORRIS B. MYERS, Petitioner Pro Se
Post Office Box 761
Midvale, Utah 84047
Tel.: 801/268 9709

31pp

TABLE OF CONTENTS

Page

Order of the District Court, District of Utah, Affirming Report and Recommendation of Magistrate Judge..... A-1

Order of the District Court, District of Utah, Dismissing Plaintiff's Complaint under FRCiP 4(j)..... A-20

Memorandum Decision and Order of the District Court, District of Utah, Denying Plaintiff's Motion to Vacate Order and Motion to Amend Complaint..... A-21

Plaintiff's Motion to Alter, Amend or Vacate August 6, 1993, Order.....A-23

Memorandum Decision and Order of the District Court, District of Utah, Denying Plaintiff's Motion to Alter, Amend or Vacate August 6, 1993, Order..... A-27

Table of Contents..... i

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MORRIS B. MYERS,

Plaintiff,

-vs-

ORDER AFFIRMING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

UNITED STATES OF AMERICA; UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS; DONALD P. LAY, THEODORE MCMILLIAN, RICHARD SHEPPARD ARNOLD, JOHN R. GIBSON, GEORGE G. FAGG, PASCO M. BOWMAN II, ROGER L. WOLLMAN, FRANK J. MAGILL, C. ARLEN BEAM, J AMES B. LOKEN, FLOYD R. GIBSON, GERALD W. HEANEY, MYRON H. BRIGHT, DONALD R. ROSS, and J. SMITH HENBLEY, judges of said court, in their official capacities,

Civil No. 91-C-1149W

Defendants.

This matter is before the court on plaintiff Morris B. Myers' objection to the Report and Recommendation of the Magistrate Judge Dismissing Myers' Motion

for Summary Judgment. By order of this court, the case was referred to the Magistrate Judge pursuant to 28 U.S.C. Sec. 636(b)(1)(B). The Magistrate Judge rendered his Report and Recommendation on April 15, 1992. After carefully reviewing the pleadings, memoranda and other papers inthe file of this case, and having considered the law and facts relating to the matter, the court now renders the following decision affirming the Report and Recommendation of the Magistrate Judge.

BACKGROUND

On November 7, 1991, Myers filed the Complaint in this matter, naming as defendants the United States of America, the United States Court of Appeals for the Eighth Circuit, and individual judges

of the Eighth Circuit. At the time he filed the Complaint, Myers did not file a copy of the Summons or any proof of service.

Myers filed an Amended Complaint, in which he named the same defendants, on January 27, 1992. Once again, Myers failed to file a copy of the Summons or other proof that any of the defendants were served.

On February 25, 1992, Myers filed a Motion for Summary Judgment. This time, Myers included a prof of service with hismotion that indicated he had hand delivered a copy of the motion and memorandum in support thereof to the United States Attorney for the District of Utah. The record is barren of any evidence, however, that Myers served the

motion on any of the individual defendants (the judges).

The United States of America filed a Motion to Dismiss Myers' action on March 30, 1991. As one basis for its motion, the United States alleges that Myers did not comply with the procedural requirements for making service of process set forth in Rule 4 of the Federal Rules of Civil Procedure. According to the United States, the record contains no evidence that Myers served a copy of the Complaint and Summons on the Attorney General of the United States. Under Rule 4(d)(5), such service is required to be made via certified mail.

Although the United States has not responded to Myers' Motion for Summary

Judgment, on April 7, 1991, the United States filed a Motion to Strike, or, in the Alternative, for Extension of Time to Respond. As the basis for the motion, the United States alleges Myers failed to comply with local Rule of Practice 202(b)(3).

Apparently in support of its response to the United States' motions, on April 13, 1991, Myers filed an uncaptioned affidavit[1] in which he avers that he caused copies of the original Complaint and Summons to be mailed via certified mail to each of the individual defendants (the judges) on November 8, 1991. Myers also avers that he hand delivered a copy of the Amended Complaint and Summons to the United States Attorney for The District of Utah on January 27,

---

1 The local Rules of Practice require that all papers filed with the Clerk of the Court contain certain common identifying information, including the case number, the nature of the document, the person on whose behalf the document is filed, and the address of that person's attorney. D. Utah R. Prac. 105-1(a). Moreover, although not expressly demanded by the rule, affidavits generaly include captions similar to those required on all pleadings, motions and memoranda. See id.

[Whether or not it is appropriate at this point to clarify the record in the trial court, Petitioner herewith points out that the affidavit referred to by Judge Winder as showing service is attached to the Summons as issued by the Clerk.]

1992, and that he mailed via certified mail a copy of the same to the United States Attorney General on January 27, 1992. Myers does not state in the affidavit whether a copy of the original Complaint was served on the United States Attorney or the Attorney General. Nor

does Myers state whether he sent copies of the Amended Complaint and Summons to each of the individual defendants.

On April 15, 1992, the Magistrate Judge entered a Report and Recommendation denying Myers' Motion for Summary Judgment. The Magistrate Judge found hat the record does not contain any evidence that Myers has properly served rocess on the defendants. The Magistrate also found taht there isnothing in the file to show that Myers has served copies of the Motion for Summary Judgment on any of the individual defendants.

This information is not suggested and/or required to make busy work for litigants. Rather, it helps the court understand the relevance of the papers presented for its consideration, and alleviates the confusion that arises when untitled papers are filed without any statement of their relevance to other parts of the record.

Myers has objected to the Magistrate's Report and Recommendation, arguing that Myers committed "no procedural irregularities that justify the Court's denial of the [Motion for Summary Judgment]." Myers reiterates that copies of the original Complaint and Summons were served on each of the individual defendants, and that copies of the Amended Complaint and Summons were served on the United States Attorney for the District of Utah and the United States Attorney General. Myers is silent on the issue of whether copies of his Motion for Summary Judgment were served on the individual defendants.

DISCUSSION

At the outset, the court notes that it agrees with the conclusions of the

Magistrate Judge. However, so a to spell out the requirements that must be met in order for this action to be maintained, the court takes this opportunity to expand upon the opinion of the Magistrate Judge.

A. Service of the Summons and Complaint.

An essential prerequisite to this court's having personal jurisdiction over a defendant is that the plaintiff properly serve the defendant with a copy of the summons and complaint. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirements, of service must be satisfied.") Proper service

requires not only that the defendant be given adequate notice of the suit but, in the absence of consent, the defendant must also be made amenable to service of summons by authorization of statute. Id.

In cases where the United States or its officers are named as defendants, service of process is authorized by Rules 4(d)(4) and 4(d)(5) of the Federal Rules of Civil Procedure. To be effective under Rule 4, however, service of process must comply with the procedural requirements set forth in the rule. For actions against the United States, these requirements include:

1. delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought or that

person's properly designated employee; and

2. sending a copy of the summons and complaint via registered or certified mail to the United States Attorney General.

Fed. R. Civ. P. 4(d)(4). For actions where officers or agencies of the United States are named as a defendants, in addition to complying with the foregoing requirements, the plaintiff must also serve copies of the summons and complaint by certified or registered mail to each of the officers and/or agencies. Fed. R. Civ. P. 4(d)(5).

In the instant case, both in the Complaint and the Amended Complaint, Myers has named as defendants the United States, the Eighth Circuit and the

individual judges of the Eighth Circuit. Thus, in order to make service of process effective as to each of these defendants, Myers must comply with the requirements of both Rules 4(d)(4) and 4(d)(5). This he has failed to do.

Based on the record, the court finds the following flaws in Myers' attempts to make service of process:

1. With respect to the original Complaint, Myers failed to serve copies on the United States Attorney for the District of Utah and the United States Attorney General; and

2. With respect to the Amended Complaint, Myers did just the opposite and, although he served the United States Attorney and Attorney General, he failed to serve the

Eighth Circuit or the individual defendants. [2]

Generally, failure to make timely service in accord with Rules 4(d)(4) and 4(d)(5) is grounds for dismissing an action. See Smith v. McNamara, 395 F.2d 896, 898 (10th Cir. 1968), cert. denied, 394 U.S. 934 (1969). Dismissal of the

---

[2] In his objection to the Magistrates' Report and Recommendation, Myers seems to suggest that service was not defective because the individual defendants were served with the original Complaint and the United States Attorney for the District of Utah and United States Attorney General were served with the Amended Complaint. According to Myers, there are no new or different causes of action in the Amended Complaint.

The court rejects this argument. For one thing, proper service of one document does not relieve a party of its obligation to properly serve other documents. Furthermore, the court does not agree with Myers that the original Complaint and Amended Complaint are identical.

Dismissal of the Amended Complaint is not compelled in this case, however, as Myers still has time to make proper service on the individual defendants. Under Rule 4(j), a party has 120 days from the date that the complaint is filed in order to serve the summons and complaint. The Amended Complaint was filed on January 27, 1992. Thus, the defendant has until 120 days after January 27 to complete proper service. Until that time, however, it would be inappropriate for this court to consider Myers' Motion for Summary Judgment. Indeed, this court will not consider that motion or any other motion until proper service has been completed.

B. Failure to Serve the Motion for Summary Judgment.

Aside from failing to execute proper service of process, there is another reason why Myers' Motion for Summary Judgment should not be considered by this court: he failed to properly serve the defendants with copies of the motion. Service of papers other than the complaint is governed by Rule 5 of the Federal Rules of Civil Procedure. Rule requires that unless otherwise provided in another Federal Rule of Civil Procedure, "every written motion other than one which may be heard ex parte. . . shall be served on each of the parties." Fed. R. Civ. P. 5(a).

In the instant case, Myers did not serve his Motion for Summary Judgment on any of the individual defendants. Rather, he only served the United States

Attorney for the District of Utah. It is true that rule 5 provides, "Whenever under [the Federal Rules of Civil Procedure] service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court." Fed. R. Civ. P. 5(a). However, when Myers served the government's attorneys with copies of his motion, the government's attorneys had not yet entered an appearance in this matter. Indeed, they had not filed any papers at all. Thus, at the time the motion was served, the individual defendants were not "part[ies] represented by an attorney," and they should have been served directly.[3]

---

[3] In this regard, Myers' citation to Rule 56 of the Federal Rules of Civil Procedure for the proposition that a motion for summary judgment may be filed within twenty days after commencement of an action is irrelevant. Although it permits a party to bring a motion within twenty days following commencement of an action, Rule 56 states nothing that would render Rule 5 of the Federal Rules of Civil Procedure inapplicable to motions for summary judgment. Nor does rule 56 affect the requirement that all parties be properly served before they are amenable to the jurisdiction of the court.

Conclusion

For the foregoing reasons, this court fully adopts and affirms the Report and Recommendation of the Magistrate Judge.

Accordingly,

IT IS HEREBY ORDERED as follows:

1. The Report and Recommendation of the Magistrate Judge in this case dated April 15, 1992, is adopted by this court.

2. The objections by the plaintiff Morris B. Myers to the Report and Recommendation are overruled.

3. The plaintiff Morris B. Myers' motion for Summary Judgment is denied for the reasons stated in this order.

4. This order shall serve as the court's ruling on this matter and no further order need by prepared by counsel.

Dated this 11th day of May, 1992.

s/David K. Winder
David K. Winder
United States District
Judge

Mailed a copy of the foregoing to the following named counsel this 11th day of May, 1992.

Michael F. Olmstead, Esq.
David Eccles Building, Suite 714
385 - 24th Street
Ogden, UT 84401

Glen R. Dawson
Assistant U.S. Attorney
476 U.S. Courthouse
Salt Lake City, UT 84101

s/Lois G. Elder
Secretary

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

MORRIS B. MYERS,
Plaintiff,

v.

U.S.A., UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS, et al.,
Defendants.

ORDER OF DISMISSAL

Civil No 91-C-1149W

An amended complaint was filed on January 27, 1992 in the above-entitled matter. No returns of summons or any other indicia of service has been filed. Pursuant to the provisions of Rule 4(j) of the Federal Rules of Civil Procedure,

IT IS ORDERED that the plaintiff's complaint is dismissed without prejudice and the clerk shall send notice of this order to the plaintiff.

Dated: August 5, 1992.

BY THE COURT
S/David K. Winder
David K. Winder,
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MORRIS B. MYERS,

Plaintiff,

-vs-

UNITED STATES OF AMERICA et al.,

Defendants.

MEMORANDUM DECISION AND ORDER

Case No. 91-C-1149W

This matter is before the court on Plaintiff Morris B. Myers' ("Plaintiff") Motion to Vacate Order and Motion to Amend Complaint. The court dismissed this matter without prejudice on August 5, 1992 under Rule 4(j) of the Federal Rules of Civil Procedure. Plaintiff's motion includes nothing that would necessitate a response from defendants, much less the granting of said motion. The court has carefully reviewed the file in this matter and the arguments advanced

in Plaintiff's motion. Being fully advised, the court is convinced Plaintiff's motion is without merit.

Accordingly, and good cause a appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion to Vacate Order and Motion to Amend Complaint is denied.

Dated this 6th day of August, 1993.

s/David K. Winder
David K. Winder
United States District Judge

Morris B. Myers, Pro Se
POB 761
Midvale, Utah 84047
Telephone 801 268 9709

IN THE UNITED STATES DISTRICT COURT FOR
DISTRICT OF UTAH
CENTRAL DIVISION

MORRIS B. MYERS,
Plaintiff,
V.
UNITED STATES OF AMERICA,
Defendant.

MOTION TO ALTER, AMEND OR VACATE AUGUST 6, ORDER

Case No. 91-C-1149W

Plaintiff herewith moves the Court for an order altering, amending, or vacating MEMORANDUM DECISION AND ORDER dated and filed August 6, 1993, upon the following grounds and for the following reasons.

[A FRCiP 59(e) motion must clearly establish either a manifest error of law or fact or present newly discovered evidence. Federal Deposit Ins. Corp. v.

Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986)]

The Court's August 5, 1992 ORDER OF DISMISSAL recites "An amended complaint was filed on January 27, 1992 in the above-entitled matter. No returns of summons or any other indicia of service has been filed. Pursuant to the provisions of Rule 4(j) of the Federal Rules of civil Procedure, etc." The so-called Amended Complaint contains no changes of substance. In the opening complaint I, in error, alleged that defendants "as judges of the said United States Eighth Circuit Court of Appeals, are officers and employees of the United States." The Amended Complaint does not include this allegation. The Amended Complaint was not served on the

individual judges because they were sued only in their official capacities which is tantamount to suing the United States of America itself. Brandon v. Holt, 479 U.S. 464, 471-72. Therefore, service was completed as required by FRCiP 4(d)(4) upon the United States of America and "indicia" of such service filed on April 13, 1992. It may be that the "indicia" or return has been removed from the file; I do, however, have in my possession a copy that bears a copy of the Clerk's stamp which upon request will be delivered to the Court. The "indicia" of service shows that Summons and Amended Complaint was served on January 27, 1992.

An examination of plaintiff's filings will indicate beyond question that the amendments requested are

justified under the rule that the limitations inherent in the requirements of due process and equal protection of the law extend to judicial, as well as political, branches of the government, so that a judgment may not be rendered in violation of these constitutional limitations and guaranties. 46 AmJur2d Judgments Sec. 17, p. 324.

WHEREFORE, plaintiff moves the Court to enter its order vacating its August 6, 1993 MEMORANDUM DECISION AND ORDER, and that an order be entered granting plaintiff's MOTION TO VACATE ORDER and MOTION TO AMEND COMPLAINT.

DATED August 15, 1993.

s/Morris B. Myers
MORRIS B. MYERS

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH - CENTRAL DIVISION

MORRIS B. MYERS,

Plaintiff,

-vs-

UNITED STATES OF AMERICA, et al.,

Defendants.

MEMORANDUM DECISION AND ORDER

Case No. 91-C-1149W

This matter is before the court on Plaintiff Morris B. Myers' ("Plaintiff") Motion to Alter, Amend or Vacate August 6, 1993 Order. The court dismissed this matter without prejudice on August 5, 1992 under Rule 4(j) of the Federal Rules of Civil Procedure. Almost one year later Plaintiff filed a Motion to Vacate Order and Motion to Amend Complaint. On August 6, 1993, the court denied that motion, holding that "[p]laintiff's motion includes nothing that would necessitate a response from defendants

much less the granting of said motion." Mem. Decision and Order at 1 (August 6, 1992). Plaintiff now has filed the instant motion to amend that ruling. Plaintiff's motion to amend is nothing more than an attempt to reargue issues already decided by the court in its previous rulings. Plaintiff's motion contains no new argument or evidence that would require the consideration, much less the granting, of his motion. In fact, plaintiff's motion to amend is without any merit whatsoever. If plaintiff wishes to pursue this litigation further he should do so by appeal to the Tenth Circuit Court of Appeals.

Accordingly, for the foregoing reasons, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion to Alter, Amend or Vacate August 6, 1993 Order is denied.

Dated this 23 day of August, 1993.

S/David K. Winder
United States District Judge